ISSUE DATE: July 29, 1998

DOCKET NO. P-421/C-97-1348

ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S West Communications, Inc. for Anticompetitive Conduct

ISSUE DATE: July 29, 1998

DOCKET NO. P-421/C-97-1348

ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS

PROCEDURAL HISTORY

On September 4, 1997, MCIm Access Transmission Systems Services, Inc. (MCIm) filed a complaint against U S West Communications, Inc. (USWC) for anticompetitive conduct. In its complaint, MCIm alleged that USWC failed to provide adequate facilities for local service, as required by state and federal law. In addition, MCIm alleged that USWC has engaged in a pattern and practice of anticompetitive conduct and that such conduct has created a barrier to MCIm's entry into the local market and has hindered MCIm in its ability to provide local telecommunications services to new customers and to provide high quality service to existing customers.

On September 16, 1997, the Commission issued a notice soliciting comments on the following three questions: 1) whether the Commission has jurisdiction over this matter; 2) whether there are reasonable grounds to investigate all allegations; and 3) whether the Commission should treat this matter as a complaint under Minn. Rule part 7829.1700, or an arbitration under Minn. Rule part 7812.1700. The notice provided parties 10 days to respond.

On September 26, 1997, MCIm, USWC, the Minnesota Department of Public Service (the Department), and the Residential and Small Business Utility Division of the Office of the Attorney General (RUD-OAG) filed comments.

On November 4, 1997, the Commission issued its ORDER FINDING JURISDICTION AND INITIATING EXPEDITED PROCEEDING. In its Order, the Commission found 1) that it has jurisdiction over the issues of the Complaint, 2) that there are reasonable grounds to investigate the Complaint, and 3) that the appropriate mechanism for resolving this Complaint was Part A, Section 11 of the MCIm/USWC Interconnection Agreement.

On November 14, 1997, USWC filed its Answer to the Complaint and Motion to Strike.

On November 24, 1997, MCIm filed its initial comments, affidavits, and opposition to USWC's Motion to Strike. USWC filed its initial comments and affidavits the same day.

On December 15, 1997, MCIm and USWC both filed rebuttal comments and affidavits.

On January 20, 1998, MCIm, USWC, and the Department filed final comments

On March 18 and 19, a two-day evidentiary hearing was held before Commissioner Scott. During this hearing the parties' witnesses were examined by Commissioner Scott, the Commission's Counsel, and Commission Staff.

On April 17, 1998, the Department, MCIm and USWC filed final comments and recommendations.

The Commission met on June 17, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

I. PRELIMINARY EVIDENTIARY CLARIFICATION

The Commission wishes to clarify the significance it has attached, while deliberating this matter, to complaints filed by MCIm against USWC in other jurisdictions, as alluded to by MCIm in its Complaint. The general rule is that the Commission may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable persons in the conduct of their affairs. Minn. Stat. § 14.60, subd. 1. Applying this rule, the Commission found that the items in question do not shed light on the merits of the specific issues before the Commission in this Order and, therefore, gave them no probative value.

Paragraph 32 of MCIm's complaint reports that MCIm has filed complaints against USWC in several jurisdictions alleging USWC's failure to meet its obligation under interconnection agreements and failure to cooperate in the development of local competition. The paragraph also notes that the Iowa Utilities Board found USWC to be in knowing and deliberate violation of the Board's orders relating to the schedule for implementation of the interconnection agreement. MCIm alleged that these actions support its assertion that USWC has engaged in a pattern and practice "in Minnesota and in other states," efforts to delay the development of competition in USWC's territory.

In developing its case against USWC in this matter, however, MCIm did not flesh out this broadly asserted allegation with any facts or analysis. The documents referred to in its Complaint (four complaints and the order of the Iowa Utilities Board) were left to speak for themselves. The Commission concludes that, of themselves, these items do not shed light on the merits of the issues before the Commission in this Order.

- Regarding the order of the Iowa Utilities Board, the record developed by MCIm in this matter does not even demonstrate the comparability of the issues in this complaint and the Iowa matter, let alone provide evidence causally linking whatever the Iowa Board found occurred in Iowa with what occurred in Minnesota. As noted later in this Order, the record produced in this matter does not support a finding that USWC employees

worked pursuant to some centrally controlled discriminatory plan intended to prejudice MCIm's competitive operations in Minnesota, let alone that they worked pursuant to an even more widespread centrally controlled plan affecting Iowa as well. Consequently, the findings of the Iowa Utilities Board have no probative value for this proceeding; that is, they do not tend to prove anything that the Commission needs to decide in this matter.

- As for the complaints filed by MCIm in the other jurisdictions (Arizona, Utah, Washington, and Colorado), the record contains nothing to demonstrate their merit or, more fundamentally, that the underlying circumstances of the complaints were similar to those in this case. The only thing that can be concluded from the existence of these complaints is that MCIm has filed interconnection agreement-related complaints in several jurisdictions. As with the Iowa Utilities Board's order, then, this evidence is not probative of any contested issue in this case.

Accordingly, in making its following determinations, the Commission has not given any weight to these items.

II. INTRODUCTION

In this Order, the Commission addresses MCIm's charges against USWC contained in a complaint filed September 4, 1997. MCIm alleged violations in fours main areas:

(a) Network Capacity and Forecasting
(b) Provisioning Intervals and Delivery of Facilities
(c) Test Orders
(d) Interim Number Portability

III. SUMMARY

In each of the four areas, the Commission finds that USWC has fallen short of compliance with the interconnection agreement in at least two instances. In one specific area (Delivery of Facilities), the Commission also finds that USWC's action (failure to meet its installation date commitments on a reasonably regular basis) violates a state statute that requires telephone companies to provide "reasonably adequate service". In no instance, however, has the Commission found that USWC intentionally violated the interconnection agreement or discriminated against MCIm in violation of state law.

In declining to make findings of intentional and discriminatory conduct on USWC's part, the Commission notes the first-time nature of the relationships and interactions created by the interconnection agreement and that the record reflects a difficult and complicated transition period in the telecommunications industry. During this initial phase of the transition, mistakes were made and USWC showed less than appropriate flexibility and cooperation to facilitate MCIm's entrance than MCIm had a right to expect under the interconnection agreement.

However, at this point the Commission gives USWC the benefit of the doubt and does not view USWC's actions as intentional and discriminatory. Instead, this Order notes where and how USWC has fallen below the appropriate standard and looks forward to improved performance. It is quite possible that if this kind of action (inaction) persists despite this corrective/clarifying Order it could be found to be intentional and discriminatory.

Finally, the Commission notes that there is room for operational improvements on both sides. Both companies will need to develop more cooperative (mutual problem-solving) modes of interaction. This Order hopefully moves the companies in that direction.

IV. FINDINGS

Based on the record of the proceedings and the arguments of counsel, the Commission makes the following findings.

A. Network Capacity and Forecasting

1. Tardy Provision of Network Forecasts: Sections 3.1 and 3.2 of the Interim Agreement

The companies' interim interconnection agreement became effective November 6, 1996[1] and remained in effect until the final interconnection agreement was approved in the Commission's March 17, 1997 Order.

MCIm alleged and the Commission finds that USWC breached provisions of Section 3 of the interim agreement by failing to provide MCIm with network forecasts. The record shows that USWC did not provide MCIm with a traffic forecast until January 1998, more than a year after the Interim Interconnection went into effect, despite its obligation under Section 3 of the interim agreement to provide 1) a one year forecast immediately upon execution of the agreement, 2) a two-year forecast six months after the effective date of this agreement, and 3) quarterly updates of these reports for all trunk routes, including end-office traffic forecasts.

2. Failure to Provide Notice of Major Network Projects: Interim Agreement (Section 3.4) and Final Interconnection Agreement (Attachment 3, Appendix A, Section 4.1.2.2)

Both the Interim Agreement and the Final Interconnection Agreement obligate USWC and MCIm to notify each other of "major network projects," i.e. developments that could affect the other party or significantly increase or decrease trunking demand for the next forecasting period. The Commission finds that USWC breached its obligation in this regard when it did not inform MCIm about the exhaust of the USWC local tandem in a timely manner. Although it knew about the exhaust, USWC did not inform MCIm about this situation until MCIm ordered tandem trunks for interconnection in March 1997.

USWC further breached this provision by failing to provide MCIm with a timely report that its (USWC's) work on permanent number portability (PNP) would effectively suspend work on interconnecting MCIm facilities into a switch. While the entire industry knew that PNP was

---

[1] On November 6, 1996, the Commission issued an ORDER approving an interim interconnection agreement between MCIm and USWC. In its Order, the Commission exercised its statutory authority to determine an appropriate interim interconnection arrangement between the companies, pending adoption of the Commission's local competition rules.

being implemented, MCIm couldn't be expected to know that USWC would suspend all work on MCIm requests for interconnection while PNP was being installed, in the absence of USWC's timely report as required under MCIm interim and final interconnection agreement.

3. Alleged Intentional and Discriminatory Breaches

MCIm asserted that USWC's breaches of the interconnection agreement (found above in sections 1 and 2) were intentional and discriminatory. The Commission finds that the noted breaches resulted from conscious decisions on the part of USWC, in the sense that USWC officials were aware that they were not providing the network forecasts and reports. However, there is inadequate record to substantiate a discriminatory or anticompetitive animus on the part of USWC in this regard.

4. Alleged Failure to Treat MCIm Fairly, Equally, and in a Non-discriminatory Manner

MCIm argued that the USWC's actions (found above) breached its obligations under Attachment 3, Appendix A, Section 7.1 of the Interconnection Agreement to treat it "fairly, equally, and in a non-discriminatory manner." The Commission agrees that USWC's actions (found above) violate this provision of the companies' agreement. The provision does not require the Commission to find that USWC had an **intention** to treat MCIm unfairly, unequally, or in discriminatory manner before a breach may be found. The provision is breached if, as an objective matter, MCIm is treated unfairly, unequally, etc. regardless of USWC's intent.

In this case, the Commission has found that USWC did not provide MCIm with certain forecasts and reports required under the agreement. Since MCIm had bargained to receive this information, USWC's non-provision of this information was unfair, regardless of what USWC's intent may have been. Further, to the extent that USWC treated MCIm differently than it treated itself with respect to the information at issue (i.e. the forecasts and the information that should have been transmitted in the reports) USWC treated MCIm unequally and discriminated (vis a vis itself) against MCIm, within the meaning of the cited section of the agreement.

5. Alleged Barrier to Entry

MCIm charged that USWC's breaches (found above) constituted a barrier to the Company's entry into the local market in violation of the Telecommunications Act of 1996. The Commission finds that the breaches slowed that entry but certainly did not prevent it. Finally, USWC's challenged actions (inactions) breached the interconnection agreement (as found above), but did not thereby automatically violate the Telecommunications Act of 1996 as asserted by MCIm.

6. Breaches in Violation of Minn. Stat. § 237.121 (4): Refused

Minn. Stat. § 237.121 states:

> A telephone company or telecommunications carrier may not do any of the following with respect to services regulated by the commission:

. . . . .

(3) **fail** to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its . . . contracts and with the commission's rules and orders.

(4) **refuse** to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its . . . contracts and with the commission's rules and orders.

The record shows that USWC could have provided the forecasts and reports of major network projects, as required by the interconnection agreement (contract), and consciously decided not to provide these items. In this sense, the Commission finds that USWC did not merely **fail** to provide the items in violation of Minn. Stat. § 237.121 (3), but did in fact **refuse** to provide them, in violation of Minn. Stat. § 237.121 (4), as alleged by MCIm.

7. Moving Forward

MCIm requested that the Commission direct USWC to 1) comply with all network forecast and major project reporting requirements and 2) immediately deploy the facilities that have been forecast by MCIm and insure that they will be available in the period forecast by MCIm. In light of the record established in this matter, these appear to be reasonable steps and the Commission will so order.

The first request requires little discussion. USWC's obligation under the agreement is clear. With the Commission's further emphasis and encouragement in this Order it is anticipated that this obligation will be promptly and consistently honored by USWC in the future.

The second request involves discussion of the timing and accuracy of MCIm's forecasts and USWC's past behavior regarding those forecasts, the alleged disregard of MCIm's July 1996 forecast and insufficient consideration of MCIm's November 1996 forecasts:

- The Commission finds that USWC did not factor in MCIm's first forecast (July 1996) because, at that time, USWC had no established process for taking CLEC forecasts into account. While this failure on USWC's part is unbecoming and will not be accepted in the future, examination of the relevant witnesses and review of the record reveals that USWC's inaction regarding the July 1996 forecast was the initial response (i.e. none) of an entrenched system unable to respond to new requirements rather than the result of a design on the part of USWC to thwart a competitor's capacity to serve its customers. The record certainly contains no showing of wrongful intent on the part of any USWC employee.

- The record indicates that USWC did take MCIm's November 1996 forecast into account but was unable to avoid exhaust and meet MCIm's orders for interconnection in March 1997 due to two factors which have been acknowledged by both MCIm and USWC: 1) when USWC is unable to meet the projected need (e.g. MCIm's November 1996 forecast) out of current capacity, it takes USWC seven months to provide the additional facilities and 2) sudden expansion in use of Internet related services, unanticipated by either MCIm or USWC, propelled an extraordinary increase in demand.

B. Provisioning Intervals and Delivery of Facilities

1. Provisioning Interval Problem: Failure to Provide FOCs for LIS Trunks in a Timely Manner Breaches the Interconnection Agreement

Attachment 3, Appendix A, Section 4.3.3 of the companies' interconnection agreement states in relevant part:

> The interval used for the provisioning of Local Interconnection Trunk Groups shall be no longer than the standard interval for the provisioning of USWC's Switched Access service and shall be consistent with USWC's actual provisioning intervals for its own Switched Access customers.

MCIm stated that USWC breached its obligations under this section by failing to provide Firm Order Confirmations (FOCs)[2] for each order to MCIm within 24 hours of receipt of a simple order and eight business days for complex orders.

The Commission finds that USWC has breached the cited section. While the cited section is not a model of clarity (no specific time intervals for FOCs are stated), it is indisputable that the parties attached some importance to timely provision of FOCs. The Commission finds that this section stands for that mutual intention and, further, that USWC's performance regarding FOCs violated the expectation of reasonable timeliness that this section represents.

USWC's defense that all MCIm orders are complex (and, therefore, that a longer period to provide the FOC should be applied) is unavailing. USWC's own filings (reflecting USWC's own classification of orders as "simple" or "complex") show that USWC's performance measured in the light of its own evidence repeatedly fails to meet the contractual standard, reasonable timeliness. The evidence shows that USWC has never provided an FOC within two business days for any MCIm local interconnection order and that the average period it took USWC to provide an FOC was 35 business days. In these circumstances, USWC's performance clearly violated the companies' agreement (mutual expectation of reasonable timeliness) regarding provision of FOCs.

The Agreement states the time for providing a FOC for LIS trunks to MCIm in terms of the standard interval for Switched Access Service. The fact that it turns out that USWC's **Service Interval Guide** does not list a standard interval for Switched Access Service does not get USWC off the hook. USWC cannot claim that there is no standard interval for providing FOCs for LIS Trunks (and therefore that its performance cannot be found unsatisfactory) just because it turns out that its **Service Interval Guide** doesn't set one for Switched Access Service. Section 4.3.3 clearly has **some** meaning, i.e. to establish some provisioning interval requirement applicable to LIS Trunks. In the absence of a specific written standard interval for LIS trunks, the Commission concludes that the parties would intend a reasonable interval to apply.

The record shows that USWC uses a 2-day interval for issuing FOCs when provisioning local interconnection trunks where facilities are in place. The Commission finds that USWC's

---

[2] A Firm Order Confirmation (FOC) is a document acknowledging receipt of the order, summarizing the order, and providing the date upon which USWC commits to delivering the specified service.

de facto established interval provides a reasonable standard by which USWC's performance with respect to provisioning LIS trunks can be measured. In that light, USWC's performance (35 days, on average, to provide an FOC) clearly breached the companies' agreement.

2. Delivery of Facilities Problem: Failure to Install LIS Trunks on the FOC's Target Date Violates Inadequate Service Requirement of Minn. Stat. § 237.06

The record shows that USWC has regularly failed to deliver local interconnection trunking on the dates it promised MCIm in its FOCs. USWC admitted a failure-to-deliver rate of 30% for local interconnection trunking. Failure to meet delivery date commitments is a serious matter, causing substantial inconvenience to MCIm customers and needless disruption and embarrassment to MCIm. USWC has not provided any reasonable explanation for such a failure rate. When ordered facilities are not in place and have to be constructed, it is understandable and expected that the provisioning (installation) period will be longer. However, this should not result in missed installation dates. USWC should be able to provide installation on the dates to which it commits.

Minn. Stat. § 237.06 states in part:

> It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for accommodation of the public, ...

The Commission finds that USWC has failed to provide MCIm "reasonably adequate service" within the meaning of the statute with respect to meeting its installation commitments.

3. Breach of Agreement Requirement to Treat MCIm Fairly, Equally and in a Nondiscriminatory Manner

The companies' interconnection agreement provides in part:

> USWC and MCIm agree to treat each other fairly, equally, and in a nondiscriminatory manner for all items included in this Agreement or related to support of items included in this Agreement.

Agreement, Attachment 3, Appendix A, Section 7.1

As noted above, USWC has regularly provided FOCs late (i.e. beyond the time indicated in the interconnection agreement) and has missed an inordinate number of committed installation dates. The Commission finds that in so doing, USWC has treated MCIm unfairly, unequally, and in a discriminatory manner in violation of the cited section of companies' Agreement.

The Commission clarifies (consistent with the discussion above regarding USWC's breach of this section with reference to network forecasts and reports of major network projects) that Section 7.1 does not require the Commission to find that USWC had an **intention** to treat MCIm unfairly, unequally, or in a discriminatory manner before a breach may be found. The provision is breached if, as an objective matter, MCIm is treated unfairly, unequally, etc. regardless of USWC's intent.

In this case, the Commission has found that USWC 1) did not provide FOCs in a timely manner and 2) very often (too often) failed to keep installation date commitments. The Commission finds that USWC's treatment of MCIm in this regard was "unfair," as that term

appears in the cited section of the agreement. Further, to the extent that USWC treated MCIm differently than it treated itself with respect to these items (provision of FOCs and keeping installation date commitments) USWC treated MCIm unequally and discriminated (vis a vis itself) against MCIm, within the meaning of the cited section.

4. Moving Forward

MCIm and the Department have suggested several steps the Commission could take to promote compliance with the interconnection agreement. The Commission will accept several of these suggestions and reject several, discussed as follows.

The Commission will accept MCIm's suggestion that USWC be ordered to deliver all interconnection facilities within the prescribed time limits of the agreement or its tariff. In light of this record, a reminder to USWC of the importance of meeting time limits and commitments seems appropriate. The Commission will not, however, commence a compliance or other proceeding for the purpose of determining any performance credits due to MCIm due based on USWC's alleged failure to meet Direct Measures of Quality (DMOQs). The Commission believes that this would unnecessarily expand the scope and purpose of this proceeding. If MCIm believes that certain DMOQs apply, it can bring those issue forward in a separate proceeding.

The Commission also finds reasonable and will accept the Department's following suggestions:

- USWC should provide a monthly report to the Commission for a period of one year which shows the time lines of the installation of LIS trunk services and trunk services used to connect MCI's customers to its network.

- USWC should provide service guarantees for service installations that are provided late; the parties should negotiate these guarantees and provide proposals to the Commission within 60 days of the Order in this case

- USWC should provide a monthly report on the conformance to the FOC standards for a period of one year and provide service guarantees for FOCs that are provided late. The parties should negotiate these guarantees and provide proposals to the Commission within 60 days of this Order.

C. Provision of Combinations of Unbundled Network Elements (UNEs) for Testing Purposes

In August 1997, MCIm placed several orders to USWC for a combination of unbundled network elements (UNEs). USWC has refused to fill these orders, in part on the grounds that MCIm's tariff does not authorize it to offer service using UNEs. USWC's argument is inapplicable in this situation, however, because MCIm intends to use the requested recombined UNEs solely for the purpose of testing the operation and efficiency of the recombined UNEs,

not to provide service to its (MCIm's) customers.[3] Such testing, MCIm has asserted, was specifically envisioned by the companies when they forged their interconnection agreement and the agreement specifically requires USWC to cooperate with MCIm regarding this testing. See Interconnection Agreement, Attachment 3, Section 14.1.

USWC has further argued, however, that providing MCIm with recombined UNEs (even for the limited purpose of testing) is inconsistent with the 8th Circuit Court of Appeals decision regarding the provision of unbundled elements. The Commission has already addressed this argument. In its February 23, 1998 ORDER DENYING RECONSIDERATION in this matter, the Commission stated on pages 2-3:

> USWC's basic objection is to decisions that the Commission made many months ago in the Consolidated Arbitration Proceeding[4] regarding the unbundling issue. It is now untimely to revisit that question. The Company may not avoid the untimeliness of its challenge by bootstrapping it to the November 4, 1997 Order.[5]
>
> USWC has alleged that MCIm has "no legal basis upon which to continue enforcement of the provisions of the interconnection Agreement that require USWC to provide combinations of network elements or superior service." The heart of USWC's argument is that the Eighth Circuit Court of Appeals decision that certain FCC rules are illegal[6] automatically renders the unbundling

---

[3] Since MCIm has clarified that it did **not** intend to use the requested UNEs to provide service to its customers, the Commission does not need to address the hypothetical question whether USWC would have had the right to refuse to provide the requested recombined UNEs service based on its belief that MCIm was about to violate its (MCIm's) tariff by providing service to customers using the recombined UNEs.

[4] In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, DOCKET NOS. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996) and ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

[5] The Commission notes that its November 4, 1997 Order, which USWC requested the Commission to reconsider, does not address the unbundling provisions that USWC now asserts are "unlawful" due to the Eighth Circuit Court of Appeals decisions. In fact, at the hearing preceding the November 4, 1997 Order, USWC did not challenge Commission jurisdiction to hear MCIm's complaints regarding implementation of the unbundling provisions and simply questioned whether the Commission had jurisdiction over allegations that are independent of the provisions of the interconnection agreement. Order at page 2.

[6] See Iowa Utilities Board v. FCC, Orders dated July 18 and October 14, 1997).

provisions of the MCIm/USWC Interconnection Agreement void or at least unenforceable.

However, it is not clear that the Eighth Circuit decisions had that intent or effect. The unbundling provisions that USWC has asserted are void or unenforceable are located in an Interconnection Agreement that the Commission ordered between MCIm and USWC after an arbitration proceeding. See Orders cited in Footnote 1.

The proximate cause of the unbundling provisions objected to by USWC, therefore, are Orders of this Commission and the contractual arrangement (Interconnection Agreement) between USWC and MCIm, not the FCC provisions struck down by the Court. Until those Orders of the Commission are amended to require alteration of the USWC/MCIm Interconnection Agreement, MCIm does have a legal basis upon to seek enforcement of those provisions.

Moreover, as the Commission further noted, the 8th Circuit Court of Appeals did not address itself to the validity of any existing Interconnection Agreements. The Commission stated:

> The Court did not even direct the party commissions to review commission-approved Interconnection Agreements for consistency with the Court's orders and revise them accordingly.[7] Hence, it does not appear that the Court intended its orders to impact the already-made decisions of state commissions or to alter the substantive terms of existing Interconnection Agreements.
>
> ORDER AFTER RECONSIDERATION at page 4.

Consistent with that reasoning, the Commission restates in this Order that the Commission's Order in the Consolidated Arbitration Proceeding[8] appears unaffected by the 8th Circuit Court's decision and therefore remains in effect.

To review: the Commission's Order in the Consolidated Arbitration Proceeding approved an interconnection agreement which, via its testing provisions, requires USWC to provide combined unbundled network elements (UNEs) to MCIm and other CLECs. The testing

---

[7] For that matter, the Commission does not view the unbundling provisions as necessarily inconsistent with the invalidity of the FCC rules and certainly the Eighth Circuit Court of Appeals did not rule that the unbundling provisions were invalid. In short, invalidation of the FCC rules does not render the unbundling provisions contrary to law as USWC contended.

[8] In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, DOCKET NOS. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996) and ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

provisions place an affirmative duty upon USWC to provide the combined UNEs as requested by MCIm. Therefore, in refusing to do so, USWC's has violated the testing provisions of the MCIm/USWC interconnection agreement.

At the same time, the Commission will exercise appropriate caution and deference with respect to any applicable federal court authority. Therefore, in light of the U. S. Supreme Court's pending review and possible clarification of the 8th Circuit Court of Appeals decision in a manner that would clearly impact the validity of the Commission's Order and the interconnection agreement's testing provisions, the Commission will on its own motion stay any requirement that USWC perform said duty and will also stay any enforcement or compliance action until 60 days after the decision by the Supreme Court regarding the 8th Circuit's decision.

In the interim, the temporary stay will not prejudice MCIm's plans to test combined network elements.[9] For emphasis and clarification, the Commission will in this Order direct USWC to provide UNEs in a manner that allows MCIm to recombine these elements itself. Thereupon, MCIm will be able to test for functionality and efficiency as desired. The Commission further notes that MCIm could recoup from USWC any expense that MCIm may incur in the interim to combine these elements for testing, if the Commission later determines in light of the Supreme Court's decision on this matter that it is appropriate for MCIm to do so.

D. Interim Local Number Portability (ILNP) Related Problems Encountered in Connection With the Final Cutover to MCIm's System

Most Minnesota customers wishing to transfer their service from USWC to MCIm want to retain their original telephone number and are unwilling to make the switch if they will be cannot keep their original telephone number. Retention of the original local telephone number despite a transfer of provider requires what is referred to as the "portability" of the local number in question, "local number portability" or LNP. Pending development of permanent methods of achieving LNP, there are several interim methods used to achieve portability for the customer's local number.

The interim method favored by MCIm and all the other CLECs is Remote Call Forwarding (RCF). RCF involves two steps that must be completed within USWC's network. The first involves disconnecting the customer's number. The second step involves changing the route, i.e. forwarding calls sent to the old number to MCIm's switch.

Since the tasks necessary to complete these steps can only be done by USWC, new entrants to the local market such as MCIm are totally dependent on USWC's proper performance of these tasks for the prompt and seamless transfer of service. Failures at this point can be seriously

---

[9] To clarify, the bottom-line issue at hand is who should bear the cost of combining (recombining) unbundled network elements (UNEs). Under the interconnection agreement approved by the Commission and objected to by USWC, this cost is borne by USWC in the sense that, upon receipt of an order from MCIm for combined UNEs, USWC must provide them to MCIm in combined form for the sum of the prices for the elements in their unbundled state. USWC does not dispute that MCIm has the right to order uncombined (unbundled) elements and combine them itself.

detrimental to the reputation of the new entrant since they can result in interruptions of service that are conspicuous and highly vexing to customers.

Not surprisingly, the interconnection agreement specifically addressed this sensitive phase of the transfer of service from USWC to MCIm. Three provisions apply:

- Attachment 5, Section 3.4 states:

  > USWC will provide MCIm with a Firm Order Confirmation (FOC) for each order within twenty-four (24) hours for a simple order or eight (8) business days for a complex order, of USWC's receipt of that order. The FOC must contain . . . USWC commitment date for order completion (Committed Due Date).

MCI has asserted that the information provided in an FOC would to allow it to coordinate with its customers to ensure a smooth transfer. Given the value of providing an FOC for the cutover date, the Commission is inclined to accept MCI's argument that Attachment 5, § 7.4.4 makes the FOC requirement contained in § 3.4 applicable to orders for ILNP. There is no reason to accept, as USWC argued, that the parties intended an FOC to be provided in connection with permanent number portability but not for interim number portability.

- Part A, Section 9.9 of the Agreement states:

  > USWC warrants that it will provide MCIm, in a competitively neutral fashion, interim number portability . . . **with as little impairment** of functioning, quality, reliability and convenience **as possible**, ... (Emphasis added.)

- Attachment 9, Section 1.3.7 states:

  > The Parties will develop and implement an efficient deployment process to ensure call routing integrity for toll and local calls, with the objective to **eliminate** customer downtime. (Emphasis added.)

Since ILNP involves disconnecting the customer's phone lines for an unspecified period of time, MCIm's policy has been to request implementation of ILNP during non-business hours so the customer's business operations are not unnecessarily disrupted. Prior to June 1997, USWC allowed MCIm to schedule cutovers for 2 a.m., a time convenient for many MCIm customers.

- In June 1997, without consulting with or negotiating with MCIm, USWC changed its policy and limited its cutovers to the hours between 7 a.m. and 6 p.m.

- When MCIm requested that USWC expand the evening hours to 9 p.m., USWC did not respond.

- When MCIm requested that USWC give it a price quote on after-hours staffing to do manned ILNP cutovers, the initiative was caught in a cross-fire of legal claims from both parties and went nowhere. According to MCIm, its request was simply motivated

by a desire to alleviate the large backlog of orders waiting FOC dates and, moreover, was not responded to within the 24 hour time frame established in the interconnection agreement. MCIm further stated that the price quote that USWC eventually provided was not cost-based as required by the agreement. USWC responded that MCIm had no right under the interconnection agreement to a 24-hour price quote and alleged that MCIm was simply searching to create a violation of the agreement. No arrangement addressing MCIm's installation problem was forthcoming.

USWC has conceded that problems with ILNP have been frequent, but blamed any delays on MCIm's failure to forecast and order sufficient trunking. USWC further stated that the changes it made in the hours it installed ILNP (performed the cutovers) was in response to the requests of other CLECs and was an effort to reduce customer downtime.

The Commission finds no evidence to support USWC's contention that the ILNP problems encountered by MCIm resulted from MCIm's failure to forecast and order sufficient trunking, as alleged by USWC. As to the changed hours for ILNP installation, the fact that some CLECs reportedly prefer this change does not remove USWC's obligations to MCIm (under the USWC/MCIm interconnection agreement) to work with MCI's particular circumstances and the specific needs of its customers to provide MCIm with ILNP with as little impairment of functioning, quality, reliability and convenience as possible (Part A, Section 9.9 of the Agreement) and to eliminate downtime (Attachment 9, Section 1.3.7).[10]

In reviewing this record, the Commission finds that USWC's efforts vis a vis MCIm in this regard have not met the standards set in the two cited provisions. The interconnection agreements approved by the Commission envision a company-specific approach (in this case an MCIm-specific approach) to impair functioning, convenience, etc., as little as possible and to eliminate down-time.

Accordingly, the Commission will direct USWC and MCIm to negotiate regarding the two suggestions MCIm has made to meet its ILNP needs and explore other appropriate means, keeping that clarification in mind:

- expansion of the hours USWC will implement ILNP from 5 a.m. to 9 p.m.; and

- provision of human intervention and assistance for cutovers beginning at 5 a.m.

The Commission believes that a more cooperative approach in this area is what is required by the agreement. This spirit of cooperation should also include a timely provision and compliance with FOCs for cutovers, as mentioned above.

---

[10] While USWC places emphasis on the word "objective", thereby arguing that a certain amount of downtime is assumed, the Commission clarifies that the goal clearly enunciated in this section is to "eliminate" downtime, not merely reduce it. Perhaps USWC's failure with respect to this provision may be traced to this subtle bit important misorientation to the task at hand, resulting in its insufficient flexibility and effort to respond to MCIm-specific conditions to eliminate downtime for MCIm.

ORDER

1. MCIm's proposal to include in the record MCIm's complaints against USWC in other jurisdictions and the Iowa Utilities Commission's order regarding MCIm's complaint against USWC in Iowa is rejected.

2. USWC shall comply with all network forecast and major project reporting requirements.

3. USWC shall immediately deploy the facilities that have been forecast by MCIm and insure that they will be available in the period forecast by MCIm.

4. USWC shall deliver all interconnection facilities within the prescribed time limits of the USWC/MCIm interconnection agreement.

5. Beginning 60 days from the date of this Order, USWC shall provide a monthly report on the conformance to the FOC standards for a period of one year.

6. USWC and MCIm shall negotiate guarantees for FOCs that are provided late and provide proposals to the Commission within 60 days of this Order.

7. On its own motion, the Commission hereby stays the requirement that USWC fill MCIm's "testing" orders for combined unbundled network elements (UNEs) until 60 days after the decision by the Supreme Court regarding the 8th Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120 F.2d 753 (8th Cir. 1997).

8. Any enforcement or compliance action regarding the testing provisions of the MCIm/USWC interconnection agreement is likewise stayed until 60 days after the Supreme Court decision.

9. USWC shall provide UNEs in a manner that allows MCIm to recombine these elements itself.

10. The companies shall negotiate 1) the hours during which customers may have their service transferred (cut over) from USWC to MCIm and 2) the hours during which human assistance will be available to assist in the cutovers.

11. Within 60 days of this Order, the companies shall submit a proposal on the two items listed in Ordering Paragraph 10 or, in the event of their inability to agree on a proposal, submit their individual position papers;

12. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).